1 2 3 4 5 UNITED STATES DISTRICT COURT 6 7 DISTRICT OF NEVADA 8 9 PEDRO VALDIVIA-TOSTADO, 10 Petitioner, 03:08-CV-00305-LRH-VPC 11 **ORDER** MICHAEL CHERTOFF, Secretary of the U.S.) 12 Department of Homeland Security; et al., 13 Respondents. 14 15 Presently before the court is Pedro Valdivia-Tostado's ("Valdivia-Tostado") Motion to 16 Order Release of Petitioner from Incarceration (# 11). The United States has filed an opposition 17 (# 14), and Valdivia-Tostado replied (# 15). 18 On June 11, 2008, this court issued an order granting Valdivia-Tostado's Application for Writ of Habeas Corpus. (June 11, 2008, Order (# 10) at 9.) As a result, the court ordered the 19 20 Board of Immigration Appeals ("BIA") to reissue its decision in Valdivia-Tostado's removal 21 proceedings. Id. The court further enjoined Respondents "from removing Valdivia-Tostado from 22 the United States or otherwise acting on the final order or removal until such time as the Board of 23 Immigration Appeals reissues its decision in Valdivia-Tostado's removal proceedings." *Id.* 24 On June 23, 2008, Valdivia-Tostado filed the present motion seeking his release from 25 incarceration. Valdivia-Tostado is currently in the Washoe County Jail under the custody of the 26 Department of Homeland Security, Bureau of Immigration and Customs Enforcement. ValdiviaTostado argues that his incarceration is in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. Specifically, Valdivia-Tostado argues he is not subject to a final order of removal. Thus, Valdivia-Tostado argues he is subject to section 236(a) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1226(a). The United States opposes the motion arguing it is entitled to detain Valdivia-Tostado pursuant to Section 241(a)(2), 8 U.S.C. § 1231(a)(2).

As a threshold issue, Valdivia-Tostado's motion is not properly before the court. In his Application for Writ of Habeas Corpus (# 1), Valdivia-Tostado asserted ineffective assistance of counsel and asked this court to order the BIA to reissue its decision and to enjoin Valdivia-Tostado's removal. The court granted the writ and ordered the relief requested by Valdivia-Tostado. (June 11, 2008, Order (# 10).) Valdivia-Tostado's habeas petition did not raise the issue that he was being unconstitutionally held in custody. Thus, the issue has not been properly presented to the court. *See Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994).

Even if the issue had been properly raised, Valdivia-Tostado has failed to demonstrate his right to relief. Valdivia-Tostado contends that "[o]nce this Court ordered the BIA to reissue its decision, Petitioner was no longer subject to a final administrative order of removal." (Mot. to Order Release (# 11) at 4-5.) Nevertheless, this court's June 11, 2008, Order did not address the validity of the final order of removal. This court lacks jurisdiction over final removal orders. 8 U.S.C. § 1252(g). As this court's Order did not effect the final removal order, Valdivia-Tostado's has not demonstrated his right for relief.

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¹In his reply points and authorities, Valdivia-Tostado asserts that the BIA has now reissued its decision. Valdivia-Tostado further asserts that he has filed an appeal and a motion for a stay of removal. The court does not consider arguments raised for the first time in a parties' reply points and authorities. Morever, Valdivia-Tostado has not shown whether the BIA will continue to hold him if a stay is issued.

1	IT IS THEREFORE ORDERED that Valdivia-Tostado's Motion to Order Release o	
2	Petitioner from Incarceration (# 11) is hereby DENIED.	
3	IT IS SO ORDERED.	
4	DATED this 27th day of August, 2008.	111-1
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7		LARRY R. HICKS
8		UNITED STATES DISTRICT JUDGE
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